Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs

2001

# David W. Randle v. Mary Beth Randle : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the Law Commons

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Mr. Brent Chipman; Attorney for Appellee.
David W. Randle; Pro Se.

Recommended Citation
Brief of Appellant, *Randle v. Randle*, No. 20010287 (Utah Court of Appeals, 2001).
https://digitalcommons.law.byu.edu/byu_ca2/3228

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

---

| | |
|---|---|
| DAVID W. RANDLE | |
| Appellant | APPELLANT'S BRIEF<br>Priority No. 15 |
| | Appellate Case No. 20010287 |
| vs. | |
| | Civil No. 924900417 |
| MARY BETH RANDLE<br>Appellee | Appeal From The Third Judicial District Court<br>Judge Glenn K. Iwasaki |

FILED
Utah Court of Appeals
JUN 26 2001
Paulette Stagg
Clerk of the Court

Mary Beth Randle
Appelle (Petitoner)
Mr. Brent Chipman #626
Attorney for Appelle
456 East 500 South
Salt Lake City, UT 84105
Telephone (801) 532-5125

David W. Randle
Appellant (Respondent)
Pro Se

9844 Glendover Way
Sandy, UT 84092
Telephone (801) 572-6304
Facsimile (801) 572-3827

Appellant Requests Opportunity For Oral Arguement.

## PARTIES TO THIS PROCEEDING

The parties to this proceeding are set forth in the caption.

TABLE OF CONTENTS

# TABLE OF AUTHORITIES & STATUTES

Cases:

Udy v. Udy, 893 P.2d 1097 (Utah App 1995)

Statutes:

Utah Code Ann. Section 78-45-2(13),

Utah Code Ann. section 78-45-7.2,

Utah Code Ann. section 78-45-7.9,

Utah Code Ann. section 78-45-7.5 (3) (b), 78-45-7.5 (7) (a).

## STATEMENT OF JURISDICTION

Jurisdiction:

The Court of Appeals has jurisdiction in this matter pursuant to Section 73-2a-3 (2) h Utah Coded Annotated 1953, as amended.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court ignore Utah Law when it refused to grant joint custody child support when the non-custodial parent has the child 45 to 51 percent of the year and earns less income than the custodial parent.
2. Did the trial court impute income in violation of Utah law since it did so without a finding of voluntary unemployment or underemployment.
3. Did the trial court improperly void the parties premarital agreement and abuse its discretion in awarding attorney fees in this case.

## STATEMENT OF THE CASE

This is an appeal from a judgment of the Third Judicial District Court, the Honorable Glenn Iwasaki presiding. The Judgment entered on February 26, 2001 resulted from a trial that began in November of 1997 with subsequent hearings on objections over a little over a three year period of time.

The Judgment awarded Appellant (Respondent) additional visitation which allows Appellant the minor child 45% to 51% of the year, refused to award child support be based on the Utah Joint Custody formula, awarded Appellee (Petitioner) additional child support based on an income figure for Appellant that the Court acknowledges is almost double what Appellee actually earns, refused to honor the parties Premarital Agreement regarding attorney fees, and Appellant believes abused discretion in awarding attorney fees.

## STATEMENT OF FACTS RELEVANT TO THE CASE

1. In a Minute Entry dated February 4, 2000, Third Judicial District Judge Glen Iwasaki ruled that Appellant was not entitled to the benefit "Joint Physical Custody" as defined in Udy v. Udy, 893 P.2d 1097 (Utah App. 1995), because of Appellant's alleged nonpayment of child support under a previously unsigned order. This previously unsigned order ignored an earlier stipulated order with which Appellant had complied.

2. Appellant has had custody of his son well in excess of 25% of the time ever since the dissolution of the marriage. (During the past five years this has been between 41% and 51% of the time.)

3. The Court clearly ruled that it would not reverse an earlier finding of a 1993 Trial Judgment that found that Appellant was not underemployed. Specifically on page 29 of the transcript of the Objections to Order Modifying Decree of Divorce And Judgment, The Court States:

   "So I think that his (Appellant) point may be well taken, that that is granted, the objection to strike the under-employed..."

4. The Court Further made a finding without evidence or hearing that Appellant had the ability to earn more than one thousand a month.

5. Appellant objected to this new finding without a hearing or trial that was contrary to the parties previous stipulation. On page 30 of the transcript it states:

"MR RANDLE: Okay. I just want it on the record for my appeal that that was an issue never presented any evidence for in the court or argued or --- or my ability to give a chance for rebuttal.

THE COURT: Okay. Next issue?

6. Appellee acknowledged that there may be a problem with the Court's ruling when on page 34 of the Transcript he states:

"MR. CHIPMAN: -- because otherwise, I think the Court of Appeals will have some problems.

THE COURT: Well, and -- and what I'm saying is it's not an imputation. It's just that I'm finding that that's just additional income, just like you said.

7. Appellant (Petitioner) attempted to interject other findings into the order that were not part of the trial hearings in order to support a ruling contrary to Utah Law in the Udy v. Udy Case

One example can be found on page 35 of the Transcript where it says:

"MR RANDLE: with a mortgage of 1,100 Apparently this purchase took place after the trial, there was no evidence submitted about it in any of the hearings we've had and his cannot be a finding without evidence.

THE COURT: Mr Chipman?

MR. CHIPMAN: Well, it was a-- it was a proposed supplemental finding on the Udy case by Mr. Randle is right that that home was purchased after 199---

THE COURT: All right. Delete it, then. Next one?

8. The Court acknowledged that it did not remember the details of this trial that it was making its ruling on. On page 39 of the transcript it states:

"MR. RANDLE: ..... I don't know if the Court remembers ---

THE COURT: Of course I don't remember.

9. At the beginning of the hearing for OBJECTIONS TO ORDER MODIFYING DECREE OR DIVORCE AND JUDGMENT the court refused to allow Appellant to present an alternative Order before the court for consideration.

On page 14 of the Transcript it states:

"MR. RANDLE: Your Honor, I would like you to 00 to allow me the opportunity to explain why I believe my alternative order is more in line with the Court's ruling.

THE COURT: Well, we'll eventually get there, depending on what's left out of your line -- by --line objections on the matter ....

Later in the hearing when Appellant attempted to present his alternative order for consideration the transcript reads on page 51

"THE COURT: No, I'm not going to rehash, I'm not going to re-plow this ground again, that's why we -- that's why we just spent this hour.

Mr. Randle, you know, the Court may have appeared to be short in the proceeding with you and --and with Mr. Chipman for that matter; but that's -- I think that's something that ought to be expected when I tray a case in '93 meet her in '97, have other hearings on it in '99 and then now in 2001, I'm faced with the -- the full cornucopia of all the objections that ran over seven years..."

## SUMMARY OF ARGUMENT

1. When a non custodial parent has a child over 25% of the time, the child support is to be determined using the Utah Joint Custody Child Support tables not the sole custody child support tables.

The facts in this case are clear that the parties share near equal time with minor child. Appellant has been awarded about an average of 45% of the time with minor child with some years the percentage going just over 50% depending on which holidays fall on which years and which weekends.

In Udy vs. Udy the court states simply and clearly that the Joint Custody worksheet is to be used when the visitation exceeds 25% of the overnights for a year.

Since Appellant (Respondent) has child 41% to 51% of the overnights over a five year period, Appellant is entitled to this benefit.

The Appellate Court makes a specific reference to this point when it says "Labels do not control the child support determination. This court indicated in Thronson v. Thronson 810 P 2d 428. 429 n. 1 (Utah App. 1991), that the labels 'custody" and "visitation" ascribed by the trial court are not as important as the

description given by the court in defining their meaning in the context of a given case."

The Court continues saying "Thus, the court must follow the mandate of Utah's child support worksheet or make findings of fact justifying its deviation. See Utah Ann. § 78-45-7 (3) (Supp. 1994); Allred v. Allred, 797 P. 2d 1108, 1111 (Utah App. 1990)." This Court made no findings of fact justifying its deviation. In fact in the 1993 trial the Findings of Fact included:

"5. Based on the evaluation of Dr. Sanders and observance of the court both parties love and are able to care for Matthew."

Therefore, the doctrine of Udy v. Udy re: Appellant's child support obligations being clearly applicable, the District Court's ruling is in error and should be reversed.

The Court's explanation that Udy v. Udy does not apply because Appellant had not paid child support is also in error. The Court can not fault Appellant for not complying with a verbal order from the Bench in December 1997 that was never signed into law until January 2001 and then use the rationale that Defendant is not entitled to this benefit because the verbal order (not the written order) of 1997 was not complied with.

Had the Court not made the error in 1997, with a joint custody

work sheet in effect, Appellant may not only have not owed any child support, but perhaps even be owed some child support by Appellee.

This is particularly true when it is considered that the Court seems also in error in imputing Appellants income.

2. **The Court is not allowed to impute income without a finding that the Appellant (Respondent) is voluntarily unemployed or underemployed and is not allowed to change Respondents income without a hearing on that matter.**

The Utah Code Section 78-45-75 (7) (a) states:

"Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the party defaults,or in contested cases, a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed."

Since the Court did not make any such finding, and no hearing was held on this matter, the Court therefore errored in increasing Appellant's (Respondent's) income by using the wording contribution instead of imputed income as a way to apparently attempt to circumvent Utah Law.

Furthermore, Appelle (Petitioner) did not present any arguments that there were any changes of circumstances related to income for the 1997 trial. Appelle did argue that her income had increased slightly.

Since there was no finding at the trial to justify a change in income from the stipulated Order of October, 1994, which was the governing order for child support before the 1997 trial, the income agreed to by the parties for the stipulated order should not be changed.

For the Court to rule that circumstances have significantly changed to void the previous stipulation order by the parties, regarding child support, then a new finding of fact with a hearing has to be made in order to set imputed income.

Appelle proposed no such finding of fact in the original proposed order after the 1997 trial. A little over three years later Appelle attempted to insert such a new finding into the Court Order and Appellant objected to such finding citing the finding of the original trial which found that income was not to be imputed. The Court sustained the objection to the proposed finding of imputed income.

However, the Court without any subsequent hearing inserted a

finding of a need for a "contribution" without any subsequent hearing or allowing Appellant to respond to this new finding.

The Court is in error in using the term "contribution" as a way to circumvent the Utah Statutes regarding imputed income. What the court has done in effect is to assign imputed income without a hearing and in violation of the Utah Code by using the word contribution instead of imputed . This is abuse of judicial discretion and this finding and order should be reversed.

In summary the Court has ruled that while income has not been imputed, that Child Support in this case is to be determined on a different standard than Utah Statutes. This decision needs to be reversed

3. The Court improperly dismissed the parties premarital agreement regarding attorney fees and also abused its discretion in the awarding of attorney fees.

Before the parties were married a Premarital Agreement that included provisions for an incentive to resolve disputes related to divorce through mediation as opposed to costly litigation.

Appelle (Petitioner) has failed to live up to the Premarital

Contract which to date the Court has not enforced.

The lack of Court enforcement of the Premarital contract on attorney fees has left Appellant with several thousands of dollars in debt that by the Premarital agreement Appelle (Petitioner) was obligated to pay.

The Court basically ruled that the Premarital agreement is not valid because it contained no provision if the mediation failed.

At the same time the State of Utah has actually gone further than the parties premarital agreement which only provided financial incentives for mediation and the State of Utah actual requires mediation of the parties.

Furthermore, the statutes also provide no provision for failed court orders such as another case I am involved with where I am not able to enforce visitation orders by Utah Courts for over five years now, or provisions for bad Court orders that result in ongoing litigation over in some cases decades of time.

The Court without comment has also provided no explanation as to why it has felt it necessary to violate Appellants religious beliefs regarding mediation that while not LDS beliefs, are nonetheless mainstream in contemporary U.S. Religious Society.

Appellants religious views on mediation in divorce matters are

not unusual. In fact they are highly supported by both the psychological literature and the policy of the United Methodist Church where Appellant and minor child currently attend.

The United Methodist Book of Discipline, which governs the polity of the Church states: § 65 D) Divorce -- When a married couple is estranged beyond reconciliation, even after thoughtful consideration and counsel, divorce is a regrettable alternative in the midst of brokenness. It is recommended that methods of mediation be used to minimize the adversarial nature and fault-finding that are often part of our current judicial processes." (United Methodist Discipline Social Principles)

As stated in the 1997 trial, the premarital contract is an enforceable contract by the Court. The contract did nothing more than provide a financial incentive to both parties to choose the religious values they had discussed prior to the marriage.

The Courts reasoning that the contract was not specific is not a valid reason to not enforce the premarital agreement.

This was not a case where mediation was tried and then failed. It is a case where Appelle (Petitioner) went right to the legal avenue without even giving mediation a chance, a clear violation of the premarital mediation agreement.

Had Appelle (Petitioner) in good faith tried mediation and it failed, she would still have the legal opportunities available just as the Utah Statutes now provide. In addition Appelle would also have had the option with some financial penalty to skip mediation as she did which option the Utah Statutes do not provide.

The net result has been that the Court has allowed Appelle to thumb her nose at the Court, and the Premarital Contract.

Appellant is simply asking the Court of Appeals to direct the Trial Court to enforce this contract that was developed from religious convictions and designed to avoid the financial disaster that has resulted from the Trial Court's lack of enforcement of this contract.

Enforcement seems even more warranted now that the State Legislature has actually enacted into law statutes that go much farther than the parties premarital agreement and without providing any specific remedy other than going to court if the mediation fails. This is all the parties premarital agreement requires, except it only provided financial incentives to do so as opposed to actually requiring this course of action as the current Utah State Statutes do now.

As a result of the Court ignoring the parties premarital

agreement, it has assessed $6,000 in attorney fees to the Appellant even though the court acknowledged that Appellant's actions were not brought about in bad faith, and even though Appellant was awarded substantial increases in visitation.

Since the Court's determination of attorney fees are both a violation of the parties premarital agreement and were determined on inflated income formulas that Appellant does not really earn, this award of attorney fees should be reversed and the premarital agreement should be enforced.

## CONCLUSION

The Trial Court has chosen to ignore the Utah Joint Custody laws as clarified in Udy v. Udy, has attempted to circumvent the prohibition of imputing income without a hearing by calling it a contribution, and has refused to enforce a religiously based premarital agreement with financial incentives for the parties to mediate divorce issues.

The Trial Court has further abused its discretion by citing non-compliance with a verbal order in 1997 as opposed to the written order of 2001 as the basis for not implementing the Udy v. Udy decision despite the Court's opportunity to implement the decision back at the Bench Ruling of the 1997 Trial.

In addition the Trial Court has abused its discretion in awarding attorney fees that are both contrary to the parties premarital agreement and has done so based on inflated income of the Appellant that is almost twice what Appellant actually makes.

Appellant pleads to the Court of Appeals for the following:

1. to require that child support be determined by Utah Statutes using the joint custody worksheet.

2. to not allow the terminology of contributions to circumvent the Utah Statutes regarding imputed income.

3. to enforce the parties premarital agreement including the elimination of attorney fees from the Court Order award.

The judgment of the trial court should be reversed in all of the above points.

# APPENDIX

## Appendix

## Table of Contents

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of appeal was sent via U.S. Mail to Brent R. Chipman at 455 East 500 South, Suite 300, Salt Lake City, UT 84111.

Date June 26, 2001

By: David W. Randle
David Randle - Respondent

# EXHIBIT A

STANFORD NIELSON (2416)
Attorney for Defendant
3760 Highland Drive, Suite 200
Salt Lake City, Utah 84106
Telephone: 278-7755

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

| | | |
|---|---|---|
| MARY BETH RANDLE,<br><br>Plaintiff,<br><br>v.<br><br>DAVID W. RANDLE,<br><br>Defendant. | :<br><br>:<br><br>:<br><br>:<br><br>: | STIPULATION TO MODIFY DECREE OF DIVORCE<br><br>Civil No. 924900417<br><br>Judge Glen K. Iwasaki |

Plaintiff and defendant stipulate to the amendment and modification of the decree of divorce singed and entered on December 6, 1993 as follows:

1. Paragraph 10 shall be amended to read, "Plaintiff shall give Defendant notice if additional day care is necessary outside the institutional day care during regular working hours (8:00 a.m. to 5:00 p.m.). Defendant shall be given the first opportunity to provide care or exercise visitation with the child during said times. Notwithstanding the foregoing, plaintiff shall not be obligated to provide defendant said first opportunity when plaintiff has social engagements after 8:00 p.m. (Sunday through Thursday when the child is in school) which do not require her to be away from her residence overnight."

2. As agreed by the parties the child support awarded in paragraph 11 shall be reduced to $125.00 effective April 1, 1994 as based upon a gross income of $1,000.00 for defendant and $1,568.00

for plaintiff.

3. Defendant shall pay to plaintiff the sum of $1,000.00 on April 19, 1994, $1,000.00 on May 19, 1994 and $1,000.00 on June 19, 1994, representing sums due and owing for child support arrearages. This sum shall satisfy all child support due through April 1994 as well all day care due through March, 1994 and all attorney's fees due plaintiff to date.

4. The parties shall use best efforts to be flexible in the scheduling of additional visitation and in allowing reasonable rescheduling when conflicts occur.

Dated this 27 day of April, 1994.

Mary Beth Randle
Plaintiff

David Randle
Defendant

On this 28th day of April, 1994 personally appeared before me Mary Beth Randle who acknowledged that she signed the foregoing document.

Notary Public
BRENT R CHIPMAN
455 East 500 South #300
Salt Lake City, Utah 84111
My Commission Expires
February 22, 1998
State of Utah

Notary Public

On this 18th day of April, 1994 personally appeared before me David Randle who acknowledged that he signed the foregoing document.

Notary Public

THOMAS P. ROBERTS
Notary Public
STATE OF UTAH
My Comm. Expires SEP 28,1996
2360 W DAYBREAKER DR PARK CITY UT 84060

# EXHIBIT B

RECEIVED DISTRICT COURT
Third Judicial District
NOV 30 1999
SALT LAKE COUNTY
By _____ Deputy Clerk

David W. Randle
Defendant
9844 Glendover Way
Sandy, UT 84092
Telephone (801) 572-6304
Facsimile (801) 572-3827

**IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH**

**SALT LAKE COUNTY, DIVISION I**

| | | |
|---|---|---|
| MARY BETH RANDLE | { | RESPONSE TO PETITIONERS MEMORANDUM IN SUPPORT OF ENTRY OF ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW |
| Petitioner | { | |
| v. | { | Civil No. 924900417 |
| | { | Judge Glenn K. Iwasaki |
| DAVID W. RANDLE | { | Commissioner Michael Evans |
| Respondent | { | |

The following is a response to Petitioner's Memorandum in support of entry of additional proposed findings of fact and conclusions of Law regarding the applicability of the Udy v Udy 893 P. 2d 1097 (Utah App. 1995) on the issue of Child Support.

## RESPONSE TO STATEMENT OF MATERIAL FACTS

1. Agreed
2. Agreed
3. Agreed to the best of my knowledge
4. Agreed
5. Denied in part. In addition to stipulation to modify Child Support, I also agreed to paid in full $3000 to Petitioner for child support arrearages, attorney fees and day care. No agreement was part of the stipulation to forego a hearing on Respondent's contempt as Mr. Chipman claims in his Memorandum.
6. Disagree. I do not believe Petitioners motion sought to specifically impute income in May of 1995.
7. Agree
8. Denied. The evaluation was to look at both custody and visitation issues. recommendations.
9. Agreed.
10. Agreed as I did not know about the Udy v. Udy case at the time of the trial.
11. Denied. No Court Order has been signed to date.
12. Denied. No Court Order has been signed to date.
13. Denied. No Court Order has been signed to date.
14. Denied No Court Order has been signed to date.
15. Denied. It has not yet been determined by the Court what child support rate will be used and it is possible that Petitioner may owe Respondent some child support. In addition no Court Order has been signed to date.
16. Denied. No Court Order has been signed to date.

17. Denied. I have paid Petitioner some medical expenses since 1997 including some of the current Orthodontist bills and have made an offer to allow Petitioner to charge amounts on my credit card to reimburse for other expenses that I owe.

18. Unsure of this item.

19. Denied. No Recommendation By Commissioner has been signed or sent to Respondent. Mr. Chipman gave Respondent until November 19th to send in objections to his proposed Commissioner Recommendation. Respondent sent in proposed changes to the Recommendation to Mr. Chipman on November 19th but Mr. Chipman sent in a proposed Order from the Commissioner without even considering Respondent's Comments.

20. Agreed.

## RESPONSE TO PETITIONERS ARGUMENT POINT 1

The Ruling of the Udy v. Udy Case makes no reference to any requirement to make a written finding or specific finding on the record supporting the conclusion. The Udy v. Udy case states simply and clearly that the Joint Custody worksheet is to be used when the visitation exceeds 25% of the overnights for a year.

I have had between 41% and 51% of the time with Matthew over the last five year period.

The Appellate Court makes a specific reference to this point when it says "Labels do not control the child support determination. This court indicated in Thronson v. Thronson, 810 P 2d 428. 429 n. 1 (Utah App. 1991), that the labels "custody" and "visitation" ascribed by the trial court are not as important as the description given by the court in defining their meaning in the context of a given case."

The Court continues saying "Thus, the court must follow the mandate of Utah's child support worksheet or make findings of fact justifying its deviation. See Utah Code Ann. § 78-45-7(3) (Supp.1994); Allred v. Allred, 797 P.2d 1108, 1111 (Utah App. 1990). " This Court made no findings of fact justifying its deviation. In fact in the 1993 trial the Findings of Fact included:

"5. Based on the evaluation of Dr. Sanders and observations of the court, both parties love and are able to care for Matthew,"

There is absolutely nothing in record that justifies the extraordinary step of the court making a finding in deviation of the Utah Statutes in this case.

## RESPONSE TO PETITIONERS ARGUMENT POINT 2

Petitioner argues that §78-45-2(13) does not apply in this case since Respondent does not contribute to the expenses of the child and he has not been paying child support as required by the statute.

There are many reasons that I have not been paying child support and they are described in detail below. The statement that Mr. Chipman makes that I do not contribute to expenses of the child is simply not true and is made by Mr. Chipman with no supporting statements of fact whatsoever. The issue of Child Support & the issue of expenses follow.

**Issue ofChild Support Payments**

In regard to the child support issue, it is important to note that prior to Petitioner's legal actions against me, 100% of all child support obligations were paid despite great financial difficulties.

A brief history of the last few years is important to understand as to why child support has not been paid in the past few years since the 1997 trial.

On September 1998 I filed with the Court an Order to Show Cause related to several visitation concerns. This matter was referred to mediation by the Visitation Mediation program through Mr. Guy M. Galli.

On September 9, 1999 Petitioner and I entered into a signed "Agreement To Mediate". (See Attached Agreement To Mediate)

At Petitioner's request financial matters that would determine child support, health payments, and other financial matters were added to the mediation process.

The Agreement to Mediate included a section on Good Faith that states:

"**GOOD FAITH**: *We agree to enter into this mediation in good faith, that is, we will attempt to resolve the disputed issues by participating fully and genuinely in the search for fair and workable solutions."*

The Agreement to Mediate included a section on Withdrawal From Mediation that states:

"*WITHDRAWAL FROM MEDIATION: We understand that once mediation begins, it is a voluntary process, and that either party may terminate the mediation at any time. ... If either party or the mediator decides to withdraw, we agree to discuss the decision with the other involved parties , and to confirm the termination in writing.*"

Several mediation sessions between the parties occurred from September 9, 1998 through August 11, 1999 that included 1 1/2 to 3 hours of time per session at a rate of $125.00 per hour.

As part of the mediation process, Mr. Brent Chipman drafted proposed Findings of Fact And Conclusions of Law and a Proposed Order.

Mr. Chipman's proposed Order was used as the starting point for both parties to mediate a Visitation Agreement.

Both Petitioner and I made improvements, clarification and changes to enhance the visitation program. We have been implementing this mediated program for over a year now.

On August 11, 1999 Petitioner and I met in mediation and completed a mediation agreement for visitation. Ms. Marci Keck, the mediator listed in her Interim Memorandum under "Tasks to be Done" the following notation "Financial Matters of Support (ongoing and arrearages) medical expenses etc. -- Decide what you want to do with these issues." (See attached Interim Memorandum of 8/11/99)

Without any further discussion or additional Mediation sessions, and not acting in good faith per The Agreement To Mediate, Mr. Chipman sent Respondent a letter of September 7, 1999. This letter stated in part:

*"if you will agree to begin making monthly payments on the support and contribution on the arrears (including day care, medical costs and the cost of insurance), then Mary Beth is willing to agree to the items discussed and agreed to in mediation."*

Mr. Chipman wrote this unethical letter despite the clear understanding that financial issues and visitation issues are to be considered as separate issues. Mr. Chipman wrote this letter despite the fact that the financial items had not yet been mediated by the parties. (See attached letter of September 7, 1999 from Mr. Brent Chipman to David W. Randle)

I acted in good faith that when Petitioner requested that financial matters would be discussed in mediation and that the Udy v. Udy case would show that neither party owed much if any child support and that Petitioner could possibly even owe Respondent a small amount of child support when the Mediation was complete. As a result of this ongoing process and given that Petitioner's attorney never provided an order for the Court re: revised Child Support, as the Court had requested him to do, I did not pay any child support from December 11, 1997 to present. In addition for almost two years the parties have on their own implemented a visitation plan that provided approximately 50% of the time for me with my son in terms of overnight stays..

The Appellate Court has made it quite clear in Udy v Udy that Utah law defines joint custody as follows: (10) "Joint physical custody" means the child stays with each parent overnight for more than 25% of the year, and both parents contribute to the expenses of the child in addition to paying child support." In this sense of I have paid child support in full.

The Appellate Court also made it clear that "Labels do not control the child support determination. This court indicated in Thronson v. Thronson, 810 P.2d 428, 429 n. 1 (Utah App.1991) that the labels "custody" and "visitation" ascribed by the trial court are not as

important as the description given by the court in defining their meaning in the context of a given case."

Under the Mediated Visitation Agreement that Petitioner and I have been living by for almost two years, I have Matthew for an average of 181 overnights or 49.6% of the year.

Under the new proposed Order of Petitioner based on the Court's ruling of almost two years ago, I would still have Matthew for 150 Overnights, or 41% of the year.

It is clear that had Mr. Chipman not sabotaged our mediation process and had we operated under the Udy v. Udy understanding of child support, that I would owe minimal if any child support for the past few years and Petitioner may have in fact owed me a minimal child support payment.

**Issue of Contribution of Expenses**

Contrary to Mr. Chipman's unsubstantiated claim, I have considerable expenses that I contribute to my son Matthew. These include but are not: limited to: the purchase of most of Matthew's clothing, food for Matthew for about half of the year, over $2000 per year in activity expenses for Matthew including but not limited to: school supplies, baseball, martial arts, classes, swimming lessons and recreation center

fees, church programs, occasional scouting programs, special events, activities with children in my neighborhood, shared cost with Petitioner in major purchases such as Matthew's most recent bicycle and total purchase of Matthew's prior two bicycles, ski expenses including lessons, lift passes, ski clothing and ski rentals, furnishings and toys for Matthew's room, special educational events for Matthew such as seminars at the Zoo, environmental education programs, national youth conferences and events, travel expenses for Matthew to visit cousins and participate in baseball tournaments, and agreed upon shared cost with Petitioner to share the expense of Matthew's allowance of $11.00 per week.

I also acknowledge responsibility to provide for one half of non routine medical and dental expenses and I have made some payment recently to the child's orthodontist bills as well as prescription drugs.

I clearly qualify in this case to have child support determined on a joint custody formula and should be awarded somewhere between a low of 41% to a high of 50% as the percentage of time in the calculation of child support.

If the court chooses to honor our mediated visitation agreement then my time should be 50%. If it does not then the average year will probably be closer to 45%.

## RESPONSE TO PETITIONERS ARGUMENT POINT 3

Petitioner argues that the Court is presumed to have considered the relevant factors to impute my income and therefore this somehow justifies an extraordinary deviation from the Utah Statutes.

In fact the Court did not provide any findings of fact for justification for modifying the Court Ordered Stipulation of October 1994 that set my income at $1,000 and reduced Petitioners income by 30%.

The Utah Statutes state in 78-45-7.5 (7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed".

Petitioner did not present any arguments that there were any changes of circumstances related to my income for the 1997 trial. Petitioner did argue that her income had increased slightly.

Since there was no finding at the trial to justify a change in income from the stipulated Order of October, 1994, which is the governing order for child support before the 1997 trial, the income agreed to by the parties for the stipulated order should not be changed.

If the court is to rule that circumstances have significantly changed to void the the previous stipulation order by the parties, regarding child support, then a new finding of fact with a hearing has to be made in order

to set imputed income. I would then have an opportunity to respond to such pleadings or filings by the Petitioner.

This was not done at the trial of 1997 and Mr. Chipman makes no offering of any such finding of fact in his proposed order. In fact the only finding of imputed income is in the 1993 Order that was superseded by the Stipulation Order of October, 1994.

The actual amount of time I have spent with Matthew over the past 5 years has ranged from a low of 41% to a high of a little over 50% on any given year. As previously stated, under the Mediated Visitation Agreement that Petitioner and Respondent have been living by for over a year now, I have had Matthew for an average of 181 overnights, or 49.6% of the year. Under the new proposed Order of Petitioner based on the Court's ruling of almost two years ago which has never been implemented, I would still have Matthew for 150 Overnights, or 41% of the year. The breakdown of this time is as follows:

| Description | Hours | Overnights |
|---|---|---|
| Alt. Weekend | 1000 | 48.5 |
| Alt Weekend Baseball | 735 | 30 |
| Mid Week | 120 | 0 |
| 6 Weeks | 792 | 33 |
| 2 Weeks | 336 | 14 |
| Monday Holidays | 0 | 2.5 |
| Easter | 120 | 5 |
| UEA | 24 | 1 |
| Birthday | 12 | 0.5 |
| Thanksgiving | 24 | 1 |
| Christmas | 144 | 6 |
| July 24th | 12 | 0.5 |
| July 4th | 12 | 0.5 |
| Veterans Day | 12 | 0.5 |
| Baseball | 200 | 9 |
| Right of first Refusal | 168 | 7 |
| Totals | 3758 | 150 Overnights (minimum) or 41% of the year |

Actual Time by Mediated Agreement that parties have been implementing.

| Description | Hours | Overnights |
|---|---|---|
| Alternate Weekends | 2400 | 104 |
| Mid Week Visitation | 500 | 26 |
| Extended Visitation 6 Weeks | 650 | 27 |
| Extended Visitation 2X1 Week | 144 | 12 |
| Monday Holidays | 60 | 2.5 |
| Other Holidays | 36 | 1.5 |
| UEA | 24 | 1 |
| Thanksgiving | 24 | 1 |
| Christmas | 144 | 6 |
| Total Hours | 3982 | 181 overnights or 49.6% of the year. |

Note: That the major difference in overnights from 150 to 181 from the visitation schedule that Petitioner and I have implemented for the past two years is related to Mid-week visitation.

Currently I keep Matthew overnight on Thursday's and take him to school in the morning as opposed to having Petitioner drive out to Sandy and wake the child up at 9:00 p.m. at night and then drive him back to Salt Lake as is the procedure described in the Court's 1997 ruling.

This arrangement actually increases transportation and food expenses for the child for myself and decreases transportation and food expenses for Petitioner. More importantly it greatly reduces the stress on Matthew and allows him to go to bed when he is tired as opposed to the court order of making him get out of bed once he is sleeping.

If I were awarded only minimum visitation but failed to ever exercise my visitation, Petitioner would have considerable need for child support just to cover the cost of additional food and clothing alone.

As it is I pay more for food, clothing, and other expenses outlined above than the total child support award was under the stipulated Order or Petitioners's proposed new order. I also pay more in these expenses than Petitioner currently pays.

The Argument that I do not pay expenses for Matthew is ridiculous and has no basis of fact whatsoever.

This is a clear case that the Udy v. Udy decision was intended for. This is a case where Petitioner makes more money than I do, the time with the child is almost equal between the parties, and I pay more of the expenses for Matthew than the Petitioner with sole custody does. Thus the need for determining child support on a joint custody basis is needed.

In addition this child support issue seems to have become some type of financial game for Petitioner and her attorney Mr. Chipman.

Mr. Chipman clearly states that his client has no problem with the agreement that was mediated and agreed to by the parties (emphasis added) if he can also get some kind of financial bonus for implementing what the parties through almost a full year of mediation have already determined is in the best interest of the child.

Mr. Chipman then further verbally threatened me with the statement that if the Court implements the Udy v. Udy decision that he would immediately seek a new order to modify my time with my son so his client could get more money.

Mr. Chipman's values in placing money for himself over the best interest of the child is all to transparent.

This action by Mr. Chipman is reprehensible and the court is encouraged to take appropriate actions against Mr. Chipman for this type of unethical behavior that has caused the Court Ordered Mediation to be sabotaged in hopes of the Court giving some kind of financial reward that is not warranted.

## RESPONSE TO PETITIONERS ARGUMENT POINT 4

Petitioner argues that though the court never really considered all relevant factors in determining child support or imputed income that the Court somehow did this implicitly.

Petitioner used only one example of this so called implicit factor. The example that Mr. Chipman uses is that "Respondent has several advanced degrees, but has been "subsisting" on $1000 per month...." Mr. Chipman goes on to state that "With Respondent's training and work experience he is clearly voluntarily underemployed".

Petitioner uses this example of advanced degrees as his argument that I am underemployed despite the specific finding of fact the court made in the 1993 Divorce Decree Order when it stated:

"*27. Defendant's doctoral degree is not marketable, and the court does not impute income to the Defendant based upon said degree.*"

Below is a more detailed response to these financial issues related to the Child Support of my other son, imputed income, and the parties premarital agreement, all of which are relevant financial factors to be considered in response to Petitioners fourth argument.

### Issue of Child Support to My Other Son

Petitioner argues that somehow child support should be increased because of the situation with my other son Jesse.

These are new claims that were not presented at the trial nor was I ever given the opportunity to respond to the imputed income assessment of Church owned property since the imputed income was based on the 1993 Order rather than the more recent 1994 Court Ordered Stipulation that set Child Support based on $1000 income of Respondent.

My income has varied over the last eight years and has been as low as less than $1000 per month in 1999.

My child support to my other son is a matter pending before another Judge. Mr. Brent R. Chipman is also the attorney in the matter with my other son.

Nancy B. Randle, Mr. Chipman's client reported to me that Mr. Chipman advised her to unlawfully flee the state and to then file false child abuse allegations against me in Massachusetts , which she did.

These false child abuse allegations against me were found to be unsupported by the State of Massachusetts.

The Court has ordered a Bench Warrant for Nancy B. Randle's arrest with a $500.00 bail and refused to hear further argument until she appears in court.

The Court ordered both parties in the case of my other son Jesse to share the cost in an expensive custody evaluation requested by Mr. Chipman, which I objected too. Final determination of fees are to be made when the matter is brought before the Court. This additional court ordered expense has also contributed to financial hardship for me.

Child Support payments to Nancy B. Randle have been agreed to be set by a signed stipulated order of the court based on the changing income of both parties as determined by federal tax returns. This order in part reads *"2. Beginning November 1, 1995 Child support shall be set at $115.00 and paid directly to Nancy B. Randle. Child support shall be adjusted on May 1, 1996 and each subsequent May 1, according to the Utah Child Support Guidelines. Both Nancy Randle and David Randle agree to mail each other a copy of their Federal Income tax return by April 15th each year for purpose of determining child support. Child support will be calculated each year using the previous years tax returns as the basis for child support calculations."*

Mr. Chipman's other client, Nancy B. Randle, has consistently refused over the past several years since she has fled the state of Utah to send me those federal tax returns to determine child support.

Under Mr. Chipman's advice, Nancy B. Randle has denied me my Court Ordered Visitation for over three years. I have not been able to see my son Jesse since June of 1996 due in part to Mr. Chipman's unethical behavior.

The Commissioner in this case has ruled that until Mr. Chipman's client complies with Court Orders regarding Visitation he is not going to order me to pay child support in this case.

Petitioner (Mary Beth Randle) in this case, had knowledge of and assisted Mr. Chipman's other client, Nancy B. Randle, in unlawfully fleeing the state and in the filing of false child abuse reports.

Mr. Chipman is now arguing that because of his unethical behavior, for which I believe the Court should issue sanctions, that Petitioner should now be rewarded for this unethical behavior.

**Issue of Imputed Income.**

I have held the position of President & CEO of a United Church of Christ (UCC) Health And Human Services Ministry Organization before the parties were married, during the time that the parties were married and continue to this day to hold that position.

I have been called to serve in the capacity of a minister to a church related health and human services agency that adjusts my salary each year according to revenues from grants, contributions and contracts.

I can not be considered underemployed for continuing my work for a Church related Health and Human Service Ministry agency that I have been employed in for over 12 years simply because budget cut backs and depletion of reserves in the organization reduce and/or limit my salary.

I have repeatedly expressed a willingness to adjust the child support contribution annually if and when my salary should increase due to increases in revenue from my employment. As previously stated I have done this with my other son already since this is the fairest and easiest way to deal with fluctuating income.

I live in a combination office and parsonage of the UCC WHALE Center in Sandy, Utah where much of my work takes place. This building

was purchased with funds from the sale of a Logo and trademark to All State Insurance Co. The sale of this logo provided funds to purchase an office/parsonage, computer and office equipment, and an automobile for the ministry and program of this small church related organization.

This purchase was not made on some income that was produced by my work but rather by the sale of this logo and trademark of the organization.

Petitioner was on the Board of Directors when this business transaction of the purchase of the building was mac'. The decision to purchase an office/parsonage was judged by the Board of Directors of the UCC WHALE Center to be the most cost effective way to sustain the organization through tough financial times over the long run. The purchase of the office/parsonage was made at a time when the UCC WHALE Center had considerably more income in part due to Petitioner, who was also producing income for the organization at the time, as well as myself and 13 other consultants we had on a large project.

The implication that this office/parsonage is somehow attributed to the earnings of myself is a misconception that Mr. Chipman has encouraged this Court to believe from the beginning of this case and it is simply a false assumption with no basis of fact.

Petitioner lives in a home with her boy friend where the two are jointly purchasing a home with a reported mortgage of $1,100 per month according to Mr. Chipman's Memorandum. Petitioner has provided no

information as to how much Petitioner pays a month and how much Petitioner's boy friend pays per month toward the mortgage of her home, nor what percentage interest Petitioner has in the home, how much down payment Petitioner was able to afford, how Petitioner was able to come up with a down payment given her financial disclosure to the court a short time before the purchase of this home, or other important financial information that was not disclosed and/or available at the time of the December 1997 trial.

The Court has not imputed income from Petitioner for having all or part of her home paid for by her boy friend. By Petitioner's own figure this would be at least $550.00 per month assuming Petitioner's boyfriend only pays half of the mortgage and more if Petitioner's boyfriend pays more of the mortgage.

The Court has not imputed any income from Petitioner for the rent or ownership of her office space at her work even though the Court has imputed income from Respondent's office space where he works.

I know of no case law to justify imputing church property used as office space as a persons income. This seems to be an extraordinary use of the the Court's discretion in this case.

The Court has not imputed any income from Petitioner for the value of her health insurance. I lost my part of this health insurance when the parties were divorced. Given the heavy financial burden the court imposed with imputed income on church property and the non use of a joint

custody child support formula at the 1993 trial as outlined in the Udy v. Udy case, I have not been able to afford health insurance since the 1993 trial.

The Court has not imputed any income from Petitioner for the Social Security contributions her employer makes to her Social Security Account even though I am not in the Social Security System. This past year I have been unable to contribute to either my Annuity Pension or Family Protection Plan due to the excessive financial obligations the Court has previously imposed on me. Not being able to make contributions to the Pension fund or Family Protection Plan due to excessive financial burdens of the Court is certainly not in the best interest of the child particularly if I were to experience some unforeseen accident or illness.

Petitioner & I agreed to a Stipulated Order, which has been signed by the Court, where we agreed to determine child support based on my income of $1000 and a 30% reduction of Petitoner's income to $1568 for the purposes of determining child support.

The 30% income figure is the figure that the United Church of Christ uses to impute income for purposes of determining contributions to its pension fund and family protection plan.

This order was signed in October, 1994, and was entered into in good faith by myself. The Stipulated Order also required me to make three payments of $1000.00 each to Petitioner which I went into debt to pay.

I am also paying on debts for attorney fees for both trials with Petitioner and actions regarding Mr. Chipman's advising his other client to unlawfully leave the State of Utah with my son Jesse. These latter attorney fees will most likely never be collected as long as Mr. Chipman's client stays out of the state of Utah.

I have been paying off each month the Child Custody Evaluation from the 1997 trial that the Court ruled that I should pay. I am currently over $25,000 in debt including about $5,000 of that debt in high interest credit card payments. Payments on these debts has made my cash flow even more difficult and real discretional income almost nonexistent.

The reality is that the two different litigations combined with a limited income of only $1000 a month which has to support most of my Matthews expenses is not enough to pay the Orders the court has imposed.

**Issue of Premarital Agreement**

Before I was married to Petitioner both parties signed a Premarital Agreement that included provisions for an incentive to resolve disputes related to a divorce through mediation as opposed to costly litigation.

Petitioner has failed to live up to the Premarital Contract which to date the Court has not enforced.

The lack of Court enforcement of the Premarital contract on attorney fees has left me with several thousands of dollars in debt that by the Premarital agreement Petitioner was obligated to pay.

Since the Court's initial ruling on the Premarital agreement that provided incentives for mediation, the State of Utah has actually enacted legislation that goes beyond the parties Premarital Agreement which only provided incentives for mediation, to the State of Utah's requirement of actually requiring mediation.

The Courts initial reasoning that the parties premarital agreement did not provide specifics if the mediation failed seems in error, particularly now when the State of Utah which actually requires mediation makes no provision for failed mediation either.

Furthermore, the statutes also provide no provision for failed court orders such as my other case of not being able to enforce visitation for with my son that I have not seen for over three years now, or the failed orders of this court that keep resulting in ongoing litigation.

My religious views on mediation in divorce matters are not unusual. In fact they are highly supported by both the psychological literature and the policy of the the United Methodist Church where I am currently attending.

The United Methodist Book of Discipline, which governs the polity of the Church states: "¶ 65 D) *Divorce* -- When a married couple is estranged beyond reconciliation, even after thoughtful consideration and counsel, divorce is a regrettable alternative in the midst of brokenness. It is recommended that methods of mediation be used to minimize the adversarial nature and fault-finding that are often part of our current

judicial processes." (United Methodist Discipline Social Principles)

As stated in the 1997 trial, the premarital contract is an enforceable contract by the Court. The contract did nothing more than provide a financial incentive to both parties to choose the religious values they had discussed prior to the marriage.

The Courts reasoning that the contract was not specific was is not a valid reason to not enforce the premarital agreement.

This was not a case where mediation was tried and the failed. It is a case where Petitioner went right to the legal avenue without even giving mediation a chance, a clear violation of the mediation agreement.

Had Petitioner in good faith tried mediation and it failed, she would still have the legal opportunities available just as the Utah Statutes now provide. In addition she would also have the option though with some financial penalty to skip mediation as she did which the State of Utah does not provide.

The net result has been that Petitioner has thumbed her nose at the Court, and the Premarital Contract, and the Court to date has allowed this behavior.

I am simply asking the Court to use its powers to enforce this contract that was developed from religious convictions and designed to avoid the financial disaster that has resulted from the Courts lack of enforcement of this contract.

Enforcement is even more warranted now that the State Legislature has actually enacted into law statutes that go much farther than the parties premarital agreement and without providing any specific remedy other than going to court if the mediation fails. This was all that the Premarital agreement of the parties did except the premarital agreement only provided for a financial incentive to do so, as opposed to actually requiring this course of action as the State Statutes now do.

The Court was asked to Reconsider its ruling on the Premarital Agreement at the December 1997 Trial but to date has not made a ruling, leaving me in a terrible financial situation.

**Summary:**

My loss of health insurance, loss of annuity/pension, loss of family protection plan, inability to afford legal counsel, and major debt to income ratio due to previous Court rulings has left me unable to pay child support on anything but a joint custody formula as provided in the Udy v. Udy case.

I should not be forced to give up my religious calling due to excessive court ordered obligations that are not in conformity with the parties Premarital Agreement that were based in part on religious convictions, imputed income that is unjust to the facts of this case, excessive child support not in conformity with the Udy v. Udy case, and

attorney awards that have been previously made in this case despite the obvious inability to pay and in opposition to the parties Premarital Agreement.

In regards to imputed income, I could understand if the Court used a reasonable standard such as the 30% that the Church uses nationally as a reasonable amount of total income that might be otherwise apportioned to housing, but can not understand the imputing of income by the Court for Office Space owned by the Church as income.

Parsonage values vary widely all over the United States and often the value has no relationship whatsoever to income. For example in Hawaii, one Parsonage of the Pastor is actually the former Governor's mansion valued at several million dollars. In Snowmass and Aspen where I began my ministry, parsonage values are far beyond what any pastor could afford to purchase. For this reason the church has fixed a value of 30% of a pastors income to determine the Pension and Family Protection Plan contributions not the market value of a parsonage.

Since housing allowances for clergy are not taxed and the IRS gives significant tax breaks for mortgage interest, clergy with larger incomes actually have a financial advantage to buying a home rather than living in a parsonage. It is therefore even more inappropriate for the Court to impute an excessive income from a Parsonage that has no relationship to a ministers salary. To do so would be the equivalent of imputing income on the Utah State Governor based on the value of the Governor's Mansion or

the President of the United States based on the value of White House. In both cases, like that of a minister, the use of the Parsonage comes with the position of the Office and is not related to income.

The child support inequity of caring for the child almost 50% of the time and paying for the majority of child's expenses has got to be corrected so that I will once again be able to pay money towards the child's health care as opposed to litigation costs of Petitioners attorney fees.

If I can no longer afford my own legal Counsel, how could I afford Petitioners. The $6,000 fees that were awarded to Petitioner despite the the fact that I prevailed in significant changes in the Visitation Order, Petitioner being found in Contempt for three separate visitation violations of which one involved considerable legal fees from my former attorney, and Petitioner obviously having much more financial resources than I do, again seems an excess in the Courts discretion.

It is Petitioner not Respondent who is able to buy a home.

It is Petitioner not Respondent who has just bought a larger car.

It is Petitioner not Respondent who can afford legal Counsel.

It is Petitioner not Respondent who can afford to send the our son to a Private School.

It is Petitioner not Respondent who is able to take several vacation trips each year.

Mr. Chipman suggests that the Court should consider all relevant

factors to determine the child support award. This is an opportunity for the Court to do just that and to include the above factors that the Court prior to date has not seemed to consider at all.

## CONCLUSION

My failure to pay child support after having paid 100% of my obligation for several years is due to many circumstances. Under the Udy v. Udy case I have still most likely overpaid on total child support for the total amount I have paid since 1993 using the sole custody vs. the joint custody formula.

Mr. Chipman's argument that since the Court Orders have nearly bankrupted me so I can not pay child support, that the lack of payment should justify an Order for me to have to pay more than I would other wise be required borders on absurdity.

Mr. Chipman's argument that my doctorate in Spiritual Disciplines, Wellness and Environmental Concerns should be used as reason to increase imputed income is contrary to the Courts finding related to the divorce decree and judgment in 1993 which clearly states that the Court finds that this degree is not marketable and does not impute income to the Defendant based upon said degree.

The lack of enforcement of the premarital agreement by the Court has violated my right to religious freedom and in light of the recent

statutes regarding mediation by the Utah State Legislature, the Court should enforce this premarital contract.

The Udy v. Udy case prevents the excessive awards of child support that are far beyond an individuals ability to pay and still have a significant relationship with their child.

The Udy v. Udy case realizes the gross inequity and injustice of having someone pay more just because the Court Order awarded sole custody rather than joint custody when in fact they pay the same expenses of food, clothes, etc. that a joint custody arrangement would require.

It is the application of a sole custody work sheet for Child Support based on excessively imputed income from Church Property that is inequitable and unjust not vice versa as Mr. Chipman would have the Court believe.

The Court should credit Respondent with Child Support from 1993 that should have been based on a Joint Custody Formula, enforce the legitimate premarital agreement contract as the court has the power to do, and reduce the income for both Petitioner and Respondent to the level that the parties agreed to in the prior Court Ordered Stipulation for purposes of determining child support.

Since no significant change in circumstances have occurred or have been argued to change this Stipulated Order and since Petitioner was given a 30% reduction in income credit to compensate for Respondent's imputed

income this is the fair and just formula that should be used for the determination of child support based on the joint custody formula.

I paid $3000 to achieve this Stipulated Order and it should not be eliminated without a change in circumstances and a hearing to justify a new imputed income.

## CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, a true and correct copy of the foregoing Response was sent via fax to Brent R. Chipman at 455 East 500 South, Suite 300, Salt Lake City, UT 84111

David W. Randle

David Randle - Respondent

Date: November 30, 1999

# AGREEMENT TO MEDIATE

**Pursuant to Utah Code Ann. § 30-3-38, we,** DAVE RANDLE **and** MARY E.G. (RANDLE) **, by our signatures below, hereby agree to participate in mediation. The mediator has explained the process and will provide services to us. We understand and agree to the following guidelines:**

GOOD FAITH: We agree to enter into this mediation in good faith; that is, we will attempt to resolve the disputed issues by participating fully and genuinely in the search for fair and workable solutions.

HONESTY: We agree to be honest and to completely disclose all relevant information and documents concerning this matter to the other party and mediator.

COURTESY: We agree to cooperate with the mediation process by remaining courteous throughout the sessions. We will refrain from personal attacks and angry outbursts, and will respect the opinions, perceptions, and feelings of the other parties in mediation.

NEUTRALITY OF MEDIATOR: We understand that the mediator serves as a neutral third party whose purpose is to promote communication and help the parties reach a mutually satisfying agreement. She/he is neither an advocate, attorney for either party, or a judge and will not offer legal advice. Nor is she/he a therapist or counselor. Her/His role is that of a neutral facilitator.

INDEPENDENT ADVICE: We understand that the mediator encourages us to consult with an attorney regarding our legal interests, rights and obligations. We have also been advised that consultation with other professionals, including a therapist or family counselor could be helpful in addressing emotional and psychological concerns which may accompany involvement in a dispute.

CONFIDENTIALITY: We understand that the mediation process requires open and honest communication in order to succeed. Therefore, it is a completely confidential, and all written and oral communications made during the mediation are privileged settlement negotiations; and, we agree that no electronic and tape recordings will be made during the mediation. Further:

The mediator will not reveal anything discussed in mediation without the permission of both parties. However, she/he is **required to report** certain matters, such as incidents of **child abuse or threats of physical violence**, and confidentiality does not extend to these matters.

The parties agree that they will not at any time during or after the mediation, call the mediator as a witness in any legal or administrative proceeding concerning this dispute. To the extent that they may have a right to call the mediator as a witness, that right is hereby waived.

The parties agree not to subpoena or demand the production of any records, notes, work product or the like of the mediator in any legal or administrative proceeding concerning this dispute. To the extent that they may have a legal right to demand these documents, that right is hereby waived.

If, at a later time, either party decides to subpoena the mediator, the mediator will move to quash the subpoena. That party agrees to reimburse the mediator for whatever expenses she/he incurs in such an action.

EXCEPTIONS TO CONFIDENTIALITY: The exceptions to the above confidentiality provisions include: (1) This agreement to mediate and any written agreement made and signed by the parties as a result of mediation may be used in any relevant proceeding, unless the parties make agreement not to do so; (2) Matters that are admissible in a court of law continue to be admissible even though raised in a mediation session; and, (3) The Visitation Mediation Program Coordinator is allowed to contact the mediator and the parties to obtain information about the case and the mediation session.

CAUCUS OR PRIVATE MEETINGS: We agree that either party may hold private sessions with the mediator at their or the mediator's request. Except for concealment of assets and matters which the mediator is legally bound to disclose, parties may specify what will remain confidential from these private sessions. No private meeting will occur without the mutual consent of both parties.

WITHDRAWAL FROM MEDIATION: We understand that once mediation begins, it is a voluntary process, and that either party may terminate the mediation at any time. The mediator also reserves the right to withdraw is she determines that the issues cannot be resolved in mediation or that she/he is unable to provide the services necessary to reach resolution. If either party or the mediator decides to withdraw, we agree to discuss the decision with the other involved parties, and to confirm the termination in writing.

FEES: We understand that the fee for mediation services is $75 per hour, and is due at the end of each session. The total fee will be divided equally by each party unless otherwise agreed upon by the parties. If a party is impecunious, their individual fee will be waived. We understand that the fee applies to all the time spent by the mediator in activities related to the completion of mediation including: meetings with parties, research time, telephone calls, preparation of documents, and expenses incurred such as long-distance telephone calls or photocopies.

Cost for mediation will be paid by each as follows:

DAVID RANDLE at $0 fee waived ~~per hour.~~

MARY E.G. RANDLE at $37.50 per hour.

Finally, we agree to be on time, and if a change in appointment time is necessary, to give 24 hours notice to the mediator, or be charged for the schedule time (not to exceed two hours).

We have read the Agreement to Mediate thoroughly and agree to the terms of the mediation.

David W. Randle 9/9/98

Signature Date

Mary E G Randle 9/9/98

Signature Date

ccord Mediation

# INTERIM MEMORANDUM

Participants: Randle

Time: 12:30 - 1:30

Mediator(s): mmm

Fees: $ 125

Date: ~~August~~ 11, 1999

Next Meeting: —

Tentative Agreements: - Dave will update the proposed Stipulation and Order, Deleting Paragraphs 23 through 25 and 28 through 29 and get it to Meg on or before Aug 13, 1999

Tasks to be Done: - Financial Matters of support (wages + assessments) medical expenses etc - Decide what you want to do w/ the issue

Agenda for Next Meeting:

Notes

# EXHIBIT C

173624

This PREMARITAL AGREEMENT, made and entered into this _____ day of SEP 23 1988, 1988, by and between David William Randle, of O'Fallon, IL, hereinafter called First Party, and Mary Elizabeth Gross, of St. Louis, MO, hereinafter called Second Party, WITNESSETH:

Whereas the parties intend to marry, and in anticipation thereof desire to fix and determine by antenuptial, or premarital, agreement that each of them shall waive, relinquish, release, and renounce any and all claim or interest either may otherwise have acquired, by virtue of their marriage, in and to the property of the other owned or accumulated prior to the marriage; and

Whereas there has been a full, fair, and adequate disclosure of assests of the parties, as well as full opportunity for independent legal counseling concerning the matters contained in this Agreement;

NOW, THEREFORE, it is agreed as follows:

1. Seperate ownership of property acquired prior to the marriage. After the marriage of the parties each shall continue to hold and retain separate title and rights in and to any and all property each owns at the time of the marriage (hereinafter called Prior Property). Each party acknowledges that the other shall have full and unrestricted right to sell, transfer, assign, encumber, or otherwise dispose of such separate Prior Property, and income therefrom (including after-marriage interest, rents, dividends, and stock splits), free from any claim, demand, community property rights, or statutory interest of the other which might have arisen in any way because of the marriage of the parties.

   Such separate ownership of Prior Property shall apply to any substitutions and replacements of such Prior Property during the marriage.

2. Provision in lieu of marital rights. For and in consideration of the marriage of the parties, and their mutual promises herein, the following provision is made: The parties hereto contemplate a happy and lasting marriage which will be terminated only by the death of one of the parties. In the unfortunate event that the marriage should be terminated by divorce (dissolution) for any reason, regardless of fault, jurisdiction, or which party is petitioner, the following shall apply:

   "That the waivers, relinquishments, release, and renunciations of the parties in and to the Prior Property of the other as herein set forth shall apply with full force and effect to any possible claim for property,

alimony, or attorney fees of or from the other in respect to such Prior Property. Further, that any property acquired through the joint efforts of the parties after the marriage shall be divided equally." (except as otherwise provided for in this agreement)

It is further agreed that each party will maintain their own separate annuity, pension, IRA, Social Security, or other retirement benefits and that these will not be subject to division of property should the unfortunate event of divorce take place.



3. Divorce Mediation Agreement. Recognizing the costly and often unnecessary use of attorneys in the unfortunate event of divorce, each party agrees to choose the option of a mediator to help in resolving any disputes that may arise in a divorce settlement.

   Should either party later decide to utilize an attorney for the purpose of separation or divorce, such party will be responsible for not only their own attorney fees but also those of the attorney fees of other party that may arise as a result of the need to defend as a response to any legal actions that may be initiated.

4. Disclosure of assets, informed and voluntary signing. The parties acknowledge that each has made good, fair, and adequate disclosure of his or her assets which comprise such Prior Property. The parties have discussed the nature and extent of the assets of each. First Party's Prior Property assets have a fair and reasonable market value of approximately $ 59,000 and Second Party's Prior Property assets have a fair and reasonable market value of approximately ($1,000) all as summarized on the Disclosure List attached to this Agreement.

   Each party ackonwledges that he or she has had adequate time to fully weigh the consequences of signing this Agreement, and has not been pressured, threatened, coerced, unduly influenced to sign this Agreement. Each party has had full opportunity to obtain the advice of independent counsel upon the matters in this Agreement, the applicable law, and the options available to him or her.

5. Signing necessary documents. The parties shall make, execurte, and deliver any and all documents, including statutory waivers, consents, joinders, or releases necessary to effectuate their above-mentioned intentions.

6. Consideration. The consideration for this Agreement is the marriage of the parties and their mutual promises herein. In the event the marriage does not take place, this Agreement shall have no force and effect whatsoever.

7. After acquired property not covered. None of the foregoing provisions shall apply to property obtained by the parties after their marriage (except income interest, rents, dividends, and stock splits from Prior Property and retirement programs as previously discussed in paragraph #2). It is thus the specific declared intention of the parties that any and all property acquired by them after their marriage (except the aforesaid income from Prior Property and retirement programs) shall be treated in all respects as if this Agreement had never been executed. Any claims, demands, and interests which the parties own or acquire by virtue of their marriage shall exist in respect to such afteraquired property, including any dower, curtesy, widow's or widower's, survivors, statutory, or election rights either has in the estate of the other upon death of such other party.

   It is further understood that all wages and salaries and related income (as opposed to the previously mentioned passive income pertaining to Prior Property and retirement programs) of the parties shall be treated as if this Agreement had never been executed.

8. Binding nature of Agreement. This Agreement shall be biinding upon and shall inure to the benefit of the parties, their heirs, executors, administrators, and personal reprentatives.

9. Entire Agreement, Amendment. This Agreement, including the attached Disclosure List, constitutes the entire understanding of the parties, and there are no other provisions, representations, or promises, express or implied, oral or written, other than as specifically set forth in this Agreement.

   No modification, termination, or amendment relating to this Agreement shall be effective unless made in writing and executed by the parties with the same formalities as this Agreement.

10. Severability. In the event that any provision of this Agreement is held to be illegal, invalid, unenforceable or against public policy, the remaining provisions of the Agreement shall nonetheless be considered valid and effective and shall be fully enforceable accordingly.

11. Controlling State Law. This Agreement shall be construed and governed by the laws of the State of Illinois.

   Dated and signed by the parties the year and day first set forth above.

SEP 2 3 1988 BOOK 0717 PAGE 802 SEP 2 3 1988

FIRST PARTY

David W. Randle

David W. Randle

SECOND PARTY

Mary Elizabeth Gross

Mary Elizabeth Gross

STATE OF ~~ILLINOIS~~ CALIFORNIA COUNTY OF ~~ST. CLAIR~~ SAN DIEGO

ON THIS _____ DAY OF SEP 2 3 1988, 1988 BEFORE ME, A NOTARY PUBLIC IN AND FOR SAID COUNTY AND STATE, PERSONALLY APPEARED David W. Randle AND Mary Elizabeth Gross TO ME PERSONALLY KNOWN, WHO DID ACKNOWLEDGE THAT THEY SIGNED THE FOREGOING AGREEMENT, AND THAT THEY SIGNED THE SAME AS THEIR VOLUNTARY ACT AND DEED.

R. M. Medina

Notary Public in and for said
County and State

My commission expires: 29 DEC. 1989

OFFICIAL SEAL
R. M. MEDINA
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires December 29, 1989

R. M. MEDINA
NOTARY PUBLIC
220 W. Broadway, Lobby
San Diego, CA 92101

# EXHIBIT D

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| MARY BETH RANDLE | : | **MINUTE ENTRY** |
| Plaintiff | : | Case No. 924900417 |
| -vs- | : | JUDGE GLENN K. IWASAKI |
| DAVID W. RANDLE | : | Date: FEBRUARY 4, 2000 |
| Defendant | : | |

THE COURT HAS PREVIOUSLY REQUESTED BRIEFING BY THE PARTIES ON THE APPLICATION, IF ANY OF THE UDY CASE RE CHILD SUPPORT. THE COURT HAS REVIEWED PETITIONER'S MEMO IN SUPPORT OF ENTRY OF ADDITIONAL FINDINGS OF FACT REGARDING UDY V. UDY, PROPOSED SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW, RESPONDENT'S PROPOSED SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND RESPONSE TO PETITIONER'S MEMORANDUM IN SUPPORT OF ENTRY OF ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

UPON REVIEW, THE COURT RULES THAT "JOINT PHYSICAL CUSTODY" DOES NOT APPLY IN THIS CASE DUE TO THE FACT THAT CHILD SUPPORT HAS NOT BEEN PAID BY RESPONDENT AS REQUIRED BY STATUTE, "EXPENSES" OF SORTS HAVE BEEN PAID BY RESPONDENT. BUT EVEN RESPONDENT ADMITS NON PAYMENT OF COURT ORDERED SUPPORT REQUIREMENT. WITH THIS RULING, THE COURT NEED NOT ADDRESS THE

ADDITIONAL ISSUES, BUT NEVERTHELESS, AGREES WITH PETITIONER ON THE OTHER POINTS ADDRESSED IN PETITIONER'S BRIEF.

BASED UPON THE FOREGOING, MR. CHIPMAN IS ORDERED TO PREPARE AND SUBMIT SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW CONSISTENT WITH THIS MINUTE ENTRY.

GKI/jmb

Case No. 924900417

Certificate of Mailing

I certify that on the 4th day of February, 2000, I sent by first class mail a true and correct copy of the attached document to the following:

BRENT R. CHIPMAN
455 EAST 500 SOUTH, SUITE 300
SLC, UTAH 84111

DAVID W. RANDLE
9844 GLENOVER WAY
SANDY, UTAH 84092

District Court Clerk

By: _____
Deputy Clerk

**Individuals with disabilities needing special accommodations during this proceeding should call 238-7300, at least three working days prior to the proceeding.
TDD phone for hearing impaired, 238-7391.

# EXHIBIT E

*1097 893 P.2d 1097

**Bradley J. UDY, Plaintiff, Appellant, and Cross-Appellee,**
**v.**
**Rebecca UDY, Defendant, Appellee, and Cross-Appellant.**

No. 930791-CA.
Court of Appeals of Utah.
April 6, 1995.

Action was brought for divorce. The First District Court, Box Elder County, Gordon J. Low, J., entered decree from which cross appeals were taken. The Court of Appeals, Billings, J., held that: (1) child support award should have been based on joint custody worksheet rather than sole custody worksheet, and (2) failure to award wife alimony or attorney fees was not error.

Affirmed in part, reversed and remanded in part.

1. APPEAL AND ERROR ⚿982(2)
30 ----
30XVI Review
30XVI(H) Discretion of Lower Court
30k982 Vacating Judgment or Order
30k982(2) Refusal to vacate.
Utah App. 1995.
Denial of motion for relief from judgment due to mistake, inadvertence, surprise, or excusable neglect, is reviewed only for abuse of discretion. Rules Civ.Proc., Rule 60(b).

2. JUDGMENT ⚿355
228 ----
228IX Opening or Vacating
228k353 Errors and Irregularities
228k355 Errors of law.
Utah App. 1995.
Mistake of law by trial court may support motion for relief from judgment. Rules Civ.Proc., Rule 60(b).

3. DIVORCE ⚿308
134 ----
134VI Custody and Support of Children
134k308 Order, judgment, or decree as to support.
Utah App. 1995.
Child support award should have been based on joint custody worksheet rather than sole custody worksheet, despite court's award to obligee spouse of "sole" custody and grant to obligor of only "expanded" visitation, where visitation order gave obligor spouse custody of child more than 25% of overnight visits annually, and obligor paid expenses for child in addition to his support obligation during time child was in his care. U.C.A.1953, 78-45-2(10)

4. DIVORCE ⚿225
134 ----
134V Alimony, Allowances, and Disposition of Property
134k220 Allowance for Counsel Fees and Expenses
134k225 Defenses and objections.

[See headnote text below]

4. DIVORCE ⚿238
134 ----
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k238 Defenses and objections.
Utah App. 1995.
Denial of alimony and attorney fees was warranted where wife, after receiving child support, had sufficient monthly income to meet her needs.

5. DIVORCE ⚿252.3(3)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) Separate property and property acquired before marriage.
Utah App. 1995.
Award of $3,000 in savings account to husband as his separate property was not abuse of discretion; that amount had been in account at time of marriage, and was always maintained during marriage.

6. DIVORCE ⚿299
134 ----
134VI Custody and Support of Children
134k299 Access to child by parent deprived of custody.

[See headnote text below]

Copyright (c) West Group 1998 No claim to original U.S. Govt. works

6. EVIDENCE ⚷570
157 ----
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k570 In general.
Utah App. 1995.

Award to husband of expanded visitation was not abuse of discretion, in view of wife's testimony that she thought temporary visitation schedule, which almost mirrored final order, should be continued, and in view of wife's failure to rebut expert testimony recommending expanded visitation. U.C.A.1953, 30-3-35.

***1098** Jeff R. Thorne (Argued), Mann, Hadfield & Thorne, Brigham City, for appellant.

Marlin J. Grant (Argued), Olson & Hoggan, P.C., Logan, for appellee.

Before BENCH, BILLINGS and ORME, JJ.

OPINION

BILLINGS, Judge:

Bradley J. Udy (Mr. Udy) appeals the trial court's denial of his Rule 60(b) motion to set aside the court's award of child support. (FN1) *See* Utah R.Civ.P. 60(b). Rebecca Udy (Ms. Udy) cross-appeals from the amended decree of divorce, alleging the trial court erred when it (1) refused to grant her temporary alimony; (2) divided the couple's marital property; and (3) granted Mr. Udy an expanded visitation schedule. We affirm in part, and reverse and remand in part.

FACTS

Mr. and Ms. Udy were married on July 27, 1987. They had one child, Joshua, born August 1, 1990. During the marriage both parties were employed full-time. For most of the marriage, Mr. Udy worked a swing shift from 4:00 p.m. until 1:30 a.m., and Ms. Udy worked a day shift from 6:00 a.m. until 3:30 p.m. After Joshua was born, this arrangement allowed one parent to be with the child nearly all of the time and alleviated the need for child care.

When the parties separated, they agreed that custody of Joshua would be shared. Mr. Udy filed for divorce, requesting that the parties' historical parenting scheme be continued.

A hearing was held before a domestic relations commissioner. The commissioner entered a temporary order, awarding custody of Joshua to Ms. Udy. The order, however, provided for a shared parenting schedule ***1099** almost identical to that followed by the parties during their initial separation.

A one-day trial was held. Both parties testified that during the pendency of the divorce, parenting duties had been shared equally and that Mr. Udy cared for Joshua about forty-six percent of the time. Ms. Udy and expert witnesses testified that Joshua had adjusted well to the relatively equal parenting schedule. Mr. Udy testified that a significant portion of his monthly budget was used to provide directly for Joshua in addition to the court-ordered child support.

The trial court awarded Ms. Udy sole custody and granted Mr. Udy expanded visitation defined as:

> On the weekend in which the father will have the child, he may pick the child up Wednesday evening at 6:30 p.m. and may keep the child Thursday, Friday, Saturday, and shall return the child Sunday at 7:00 p.m. to the mother's home.
>
> On the week when the father does not have the child for his weekend, he shall be entitled to have the child Wednesday evening from 3:30 p.m. to 10:00 p.m.

The court calculated child support using a sole custody worksheet, ordering support in the amount of $273 per month.

The court determined that both parties had approximately equal disposable income after meeting their monthly expenses and therefore declined to award Ms. Udy alimony or assistance with the payment of her attorney fees. Moreover, the court found that the parties had very little marital property or marital debt and awarded Ms. Udy a lump sum judgment of $1500, reflecting her equitable share of the income Mr. Udy earned during the pendency of the divorce which exceeded her own income. (FN2) Finally, the court found that at the time the parties married, Mr. Udy had $3000 in savings, which was always maintained during the marriage. The court determined this sum reflected Mr. Udy's separate property.

Copyright (c) West Group 1998 No claim to original U.S. Govt. works

I. APPEAL

[1] Mr. Udy contends the trial court erred when it denied his Rule 60(b) motion. In relevant part, Rule 60(b) provides that a trial court may relieve a party of a judgment in case of: "(1) mistake, inadvertence, surprise, or excusable neglect." Utah R.Civ.P. 60(b). Moreover, "[a] trial court has discretion in determining whether a movant has shown 'mistake, inadvertence, surprise, or excusable neglect,' and this Court will reverse the trial court's ruling only when there has been an abuse of discretion." *Larsen v. Collina,* 684 P.2d 52, 54 (Utah 1984).

[2] Mr. Udy argues that the trial court committed judicial error when it failed to base its child support determination upon a joint custody worksheet. He claims that under the court's expanded visitation order, he actually had custody of Joshua thirty-three percent of the overnights and Utah's child support guidelines mandate the use of a joint custody worksheet if the overnight visits exceed twenty-five percent. *See* Utah Code Ann. § 78-45-2(10) (Supp.1994). Mr. Udy alleges state and federal law provide that "mistake" under Rule 60(b)(1) includes judicial error, and that he is therefore entitled to Rule 60(b) relief from the operation of the child support order. We agree that a mistake of law by the trial court may support a Rule 60(b) motion. *See Jones v. Anderson-Tully Co.,* 722 F.2d 211, 212-13 (5th Cir.1984); *Parks v. U.S. Life & Credit Corp.,* 677 F.2d 838, 839-40 (11th Cir.1982); *Compton v. Alton Steamship Co.,* 608 F.2d 96, 104 (4th Cir.1979); *C.J. Oliver v. Home Indem. Co.,* 470 F.2d 329, 330-31 (5th Cir.1972), *aff'd,* 487 F.2d 514 (5th Cir.1973); *Calder Bros. Co. v. Anderson,* 652 P.2d 922, 926 (Utah 1982); *see also Richards v. Siddoway,* 24 Utah 2d 314, 471 P.2d 143, 145 (1970) (indicating that within time set forth by statute or rule judicial error may be corrected by trial court on motion). We therefore consider whether the court abused its discretion in failing to grant Mr. Udy's Rule 60(b) motion.

Utah law defines joint custody as follows:

> (10) "Joint physical custody" means the child stays with each parent overnight for more than 25% of the year, and both parents ***1100** contribute to the expenses of the child in addition to paying child support.
>
> Utah Code Ann. § 78-45-2(10) (Supp.1994).

[3] Based upon the court-ordered visitation, Mr. Udy has Joshua for a total of 120 overnight stays per year. In addition, Mr. Udy has Joshua on alternating Sundays from early morning until 7:00 p.m., and on alternating Wednesdays from 3:30 p.m. until 10:00 p.m. Based upon the overnight stays alone, Mr. Udy has custody of Joshua thirty-three percent of the time--which clearly exceeds the time required by section 78-45-2(10). Likewise, the record reflects that Mr. Udy pays expenses for Joshua in addition to his support obligation during the time that Joshua is in Mr. Udy's care.

Ms. Udy contends that the trial court did not err when it awarded child support based upon a sole custody worksheet. She argues that because the trial court awarded her "sole" custody of Joshua and granted Mr. Udy only "expanded" visitation, the court had the discretion to apply the sole custody worksheet. We are not persuaded. Labels do not control the child support determination. This court indicated in *Thronson v. Thronson,* 810 P.2d 428, 429 n. 1 (Utah App.1991), that the labels "custody" and "visitation" ascribed by the trial court are not as important as the description given by the court in defining their meaning in the context of a given case.

Although labeled "sole custody," the trial court awarded Mr. Udy visitation that exceeded the threshold for joint physical custody under section 78-45-2(10). Thus, the court must follow the mandate of Utah's child support guidelines, and use the joint custody child support worksheet or make findings of fact justifying its deviation. *See* Utah Code Ann. § 78-45-7(3) (Supp.1994); *Allred v. Allred,* 797 P.2d 1108, 1111 (Utah App.1990).

The trial court did not make findings to explain why it elected not to apply a joint custody worksheet, nor why such a computation would have been inequitable. Thus, we reverse and remand for sufficient findings to support the court's deviation from Utah's child support guidelines or a recalculation of the support obligation using the joint custody worksheet.

II. CROSS-APPEAL

[4] In her cross-appeal, Ms. Udy contends the trial court erred by failing to award her temporary and prospective alimony. "We will not disturb a trial court's ruling on alimony as long as the court 'exercises its discretion within the bounds and under

Copyright (c) West Group 1998 No claim to original U.S. Govt. works

the standards we have set and has supported its decision with adequate findings and conclusions.' " *Bell v. Bell,* 810 P.2d 489, 491 (Utah App.1991) (quoting *Naranjo v. Naranjo,* 751 P.2d 1144, 1147 (Utah App.1988)). The trial court found Mr. Udy earned a gross monthly income of $2786 and had available income after taxes and social security of $1887 per month. The court also found Ms. Udy had a gross monthly income of $1720 and available income after taxes and social security of $1400 per month.

Based upon our review of the record, the trial court's findings accurately reflects Ms. Udy's income. Including the $273 that she receives in child support from Mr. Udy, Ms. Udy has approximately $1667 to meet her monthly needs. Ms. Udy estimated her monthly budget at $1165. Thus, even if the court were to reduce her child support award by applying the joint custody worksheet, Ms. Udy still has sufficient income to meet her needs. We therefore affirm the trial court's determination regarding alimony.

Under this same rationale, we affirm the trial court's ruling denying Ms. Udy assistance with the payment of her attorney fees. In the instant case, the trial court found that each party incurred comparable attorney fees, and found that each party had equal ability to pay their own reasonable fees. We therefore affirm the trial court's refusal to award Ms. Udy her attorney fees.

[5] Ms. Udy also alleges that the trial court erred when it divided the parties' savings account as of the date of the separation and awarded Mr. Udy, as separate property, the $3000 sum that he had placed into a savings account prior to the marriage. "There is no fixed formula upon which to determine a division of properties in a divorce ***1101.** action[;] the trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity." *Naranjo,* 751 P.2d at 1146 (citation omitted). "This court will not disturb the trial court's decision unless it is clearly unjust or a clear abuse of discretion." *Walters v. Walters,* 812 P.2d 64, 66 (Utah App.1991), *cert. denied,* 836 P.2d 1383 (Utah 1992).

Both parties utilized portions of the savings account for his or her own support during the pendency of the divorce. At the time of the separation, there was in excess of $30,000 in the savings account. On July 8, 1992, Ms. Udy withdrew nearly $12,000 to purchase a car. From the remaining balance, each party received approximately $9000.

Additionally, Ms. Udy contends the trial court erred when it found that Mr. Udy should retain the benefit of the $3000 that he had deposited into the savings account prior to the marriage. In pertinent part, in awarding Ms. Udy property from the marriage, the trial court found Mr. Udy had earned $6000 ($530 per month) more than Ms. Udy during the pendency of the divorce and found that that sum was marital income. The trial court therefore deducted from this amount the $3000 in savings that the court held reflected Mr. Udy's separate property and divided the balance between the parties, yielding a lump sum judgment of $1500 in favor of Ms. Udy. The trial court has considerable latitude in dividing marital assets. We cannot say the trial court abused its discretion in its property division.

[6] Finally, Ms. Udy insists the trial court abused its discretion by awarding Mr. Udy visitation in excess of the statutory minimum. *See* Utah Code Ann. § 30-3-35 (Supp.1994). The trial court awarded Ms. Udy sole custody of Joshua, but awarded Mr. Udy expanded visitation. The court found that Ms. Udy had not presented evidence to rebut the testimony of the experts who recommended expanded visitation. Furthermore, when asked at trial whether the temporary visitation schedule--which almost mirrors the final order--should be continued, Ms. Udy testified that she thought it should. The trial court's ruling is in accord with the testimony received at trial regarding the best interests of the child, *see* Utah Code Ann. § 30-3-34 (Supp.1994), and we therefore affirm the court's physical custody schedule.

## CONCLUSION

We conclude the trial court abused its discretion when it denied Mr. Udy's Rule 60(b) motion to set aside his child support. The undisputed facts establish that Mr. Udy had joint custody of his child and, thus, that his support should have been calculated using a joint custody worksheet absent findings as to why the trial court deviated from the guidelines support. We therefore reverse the award of child support and remand for further findings justifying a deviation from the guidelines or a recalculation using the joint custody worksheet.

Copyright (c) West Group 1998 No claim to original U.S. Govt. works

With respect to Ms. Udy's claims of alimony, attorney fees, property distribution, and visitation, we cannot say the court abused its discretion and therefore affirm its decision on each ground.

BENCH and ORME, JJ., concur.

FN1. Mr. Udy appealed from the trial court's denial of both a Rule 59 and a Rule 60 motion. *See* Utah R.Civ.P. 59, 60. His notice of appeal, however, was filed with this court prior to the trial court's entry of a formal order denying the motions. Pursuant to Rule 4(c) of the Utah Rules of Appellate Procedure, an appeal filed from the denial of a Rule 59 motion has no effect if it is filed prior to entry of the final order. An appeal from a Rule 60 motion is not similarly limited. Accordingly, on February 7, 1994, this court entered an order limiting Mr. Udy's appeal to whether the trial court appropriately denied the Rule 60 motion, finding that all other issues had been waived by his failure to file a new notice of appeal.

FN2. The propriety of this part of the decree is not contested by Mr. Udy and thus is not before us.

Copyright (c) West Group 1998 No claim to original U.S. Govt. works